



# **POLICY DOCUMENT REGARDING THE CONTRACTING OF SERVICES BY CSOs**

**2022**





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## 1. INTRODUCTION

Services contracting by public institutions to Civil Society Organizations (CSOs) represents a very important form of providing services to the beneficiaries of these services. This form took place in European countries, whereas in the last two decades, even the countries of the former Eastern bloc have developed the necessary legal infrastructure and have started to implement this form of service provision. The contracting of services as a form of purchasing/providing services is justifiable in both, perspective of public institutions and the perspective of CSOs. From the perspective of public institutions, the provision of these services is treated as a form of conflict of interest, since the same institution designs policies and approves or suggests legislation, and its implementation by the same institution is also treated as a conflict of interest. Furthermore, the lack of human and institutional capacities means that these services are performed with more quality through contracting. On the other hand, from the perspective of CSOs, these organizations are more specialized in solving problems related to services, have innovative solutions, are more flexible in recruiting necessary staff and are able to attract funds from others for provision of service<sup>1</sup>, and this affects contacting the service at a lower price than the contracts that take place in regular public procurement procedures..

On the other hand, also in the Republic of Kosovo in recent years, dozens of similar projects have been developed where public institutions, in some form, have contracted services from CSOs. But in the absence of a legal act and a clear procedure, various contracting procedures have been used, mainly through contracting according to Regulation MF-No. 04/2017 on Criteria, Standards and Procedures on Public Financing of NGOs (Regulation No. 04/2017) or legal acts of institutions with similar procedures, exceptionally also with direct contracting. In this policy document related to the contracting of services by CSOs, the identification and analysis of the current legal infrastructure in the Republic of Kosovo that is directly or indirectly related to the contracting of services between public institutions and NGOs was conducted. Afterwards, concrete recommendations were given regarding the actions that should be taken regarding the drafting of a legal act related to the contracting of services. Finally, a detailed framework about the content of the by-law is provided.

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<sup>1</sup> *Inclusion of Civil Society Organizations in Contracting of Government Tasks, faqe 17 - 18*

## **2. LEGAL INFRASTRUCTURE OF CONTRACTING SERVICES WITH CSOs IN THE REPUBLIC OF KOSOVO**

Since the establishment of the first institutions in Kosovo, and especially after the declaration of the independence of the Republic of Kosovo, Kosovo had a great surge in drafting of legislation. This was necessary to cover the legislative gap of a new state. However, in the context of the contracting of services with CSOs, public institutions have not drafted any special legal act or any provision within any other legal act that regulates the contracting of services by CSOs. On the other hand, legal provisions have been approved that have incomplete and direct regulation, or have partial regulation regarding contacting services from CSOs, such as Law No. 06/L-043 on Freedom of Association in Non-Governmental Organizations (Law on Freedom of Association) Law No. 02/L-17 on social and family services, which was supplemented and amended by Law No. 04/L-081 (Law on Social and Family Services), laws No. 04/L-125 on Health, amended and supplemented by Law No. 08/L-043 (Law on Health), Law No. 06/L-022 on Social Enterprises (Law on Social Enterprises), Law No. 04/L-042 on Public Procurement of the Republic of Kosovo, amended and supplemented by Law no. 04/L-237. with Law No. 05/L-068 and with Law No. 05/L-098 (Law on Public Procurement), and Law No. 03/L-048 on Public Financial Management and Accountability (2008), supplemented and amended several times with Law No. 03/L-221. with Law No. 04/L-116. with Law No. 04/L-194. with Law No. 05/L-063 and the Law No. 05/L-007 (Law on Public Financial Management).

### **2.1. Law on Freedom of Association**

The Law on Freedom of Association in Non-Governmental Organizations defines the rules for the establishment, registration, operation, suspension, termination, prohibition of activities and deregistration of non-governmental organizations in the Republic of Kosovo. This Law, approved in 2019 has created a clear legal basis for the economic activity of CSOs, where according to the provisions of this Law, NGOs can engage in economic activities in order to support their non-profit activities in accordance with the principle of "non-profit", provided that the income generated through economic activities is used exclusively to fulfill its mission. Furthermore, NGOs can own and manage property and assets to achieve their non-profit goals<sup>2</sup>. As for economic activities, NGOs, in the first place, could exercise economic activities related to the field of their registered activities. The economic activities of NGOs could be exercised directly by legal entities registered as NGOs, or even in conjunction with other specific laws, such as social entrepreneurship legislation that enables NGOs to acquire the status of social enterprise.

### **2.2. Law on Social and Family Services**

The Law on Social and Family Services defines and regulates the provision of social and family services for persons in need and families in need in the Republic of Kosovo. The

<sup>2</sup> Ligji për Lirinë e Asociimit, neni 35, paragrafi 2 dhe 3. <https://gzk.rks-gov.net/ActDetail.aspx?ActID=19055>

provisions of this law constitute the main basis for provision of social and family services in the Republic of Kosovo. On the issue of providing social and family services, this Law defined a dual role for the Ministry of Labor and Social Welfare (now the Ministry of Finance, Labor and Transfers): the role of the governing authority and the role of the service provider. Therefore, this Ministry, on the one hand, drafts policies for the provision of social and family services, and on the other hand, is defined as a provider of these services.<sup>3</sup>

However, this Law also recognizes the right of CSOs to provide social and family services, according to the criteria defined by this Law. According to the provisions of this law, registered and licensed non-governmental organizations are encouraged to provide social and family services, either on their own initiative or by contract, and for this purpose public institutions provide counseling and guidance to these organizations. These organizations must be registered and licensed. Furthermore, these provisions enable the Ministry and the municipalities to contract these services, where the Municipalities can enter into contracts with non-governmental organizations for the provision of special social and family services within their territory on behalf of the municipality, provided that such contracts are in accordance with the municipality annual plans for social and family services in its territory; and the Ministry may conclude contracts with non-governmental organizations for the provision of specific Social and Family Services across Kosovo, and may grant funds and provide any other material assistance, including premises, or advice to non-governmental organizations providing specific Social and Family Services across Kosovo<sup>4</sup>.

In addition to this law, a considerable number of by-laws have been issued for its implementation, and in particular it should be noted Administrative Instruction (MLSW) No. 02/2020 for the Licensing of Non-Governmental Organizations and Private Legal Entities Providing Social and Family Services<sup>5</sup>, a by-law which stipulates that NGOs and other entities that provide social services must go through a licensing process, which guarantees the fulfillment of minimum criteria for providing social services. In addition, this by-law has enabled not only NGOs, but also other entities organized in the form of legal entities to provide social and family services after prior licensing. However, this Administrative Instruction does not regulate service contracting issues, but simply focuses on the licensing process.

## 2.3. Law on Health

Law on Health aims to ensure legal basis for the preservation and advancement of health of the citizens of the Republic of Kosovo through health promotion, preventive activities, and the provision of comprehensive and qualitative health care services. According to the provisions of this Law, "**health institution**" can be establish by any legal entity that provides health care services, based on the issued license<sup>6</sup>. According to this provision, it is observed that CSOs can also establish health institutions, however, the secondary legislation on the implementation of this legal provision, refers on the licensing of natural persons and business organizations<sup>7</sup>. However, this law also recognizes "humanitarian health institutions" that are established by non-governmental and non-profit organizations

<sup>3</sup> Article 2, par. 1 and 2 of the Law on Social and Family Services.

<sup>4</sup> Article 8, par. 4, 5 and 6 of the Law on Social and Family Services.

<sup>5</sup> <https://gzk.rks-gov.net/ActDetail.aspx?ActID=36039>

<sup>6</sup> Article 3, par. 1.19 of the Law on Health. <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8666>

<sup>7</sup> Article 8, par. 2.5 and 3.5 Administrative Instruction No. 08/2014 – Procedures on Licensing Private Health Institutions.

situated in the Republic of Kosovo and that must have a license for health activities<sup>8</sup>. Additionally, based on Article 38 of this law, where the legal basis for the regulation of health care services in humanitarian health institutions and other forms of organization of civil society in the field of health is defined by a bylaw, the Ministry of Health has issued the Administrative Instruction (MH) No. 04/2014 for Health Care Services in Humanitarian Health Institutions and other Forms of Civil Society Organization in the Health Sector.<sup>9</sup> According to the provisions of this by-law, the health services that are provided within the projects implemented by civil society are organized in accordance with the Law on Health and the cooperation agreement between the non-governmental organization, the Ministry of Health and the relevant line ministry that covers the subject where the project will be implemented, including the beneficiary entity of the services.<sup>10</sup> Further, this by-law determines that the provision of free health services by these institutions excludes the payment of the administrative tax during the licensing of humanitarian health institutions.<sup>11</sup>

## **2.4. Law on Social Enterprises**

The Law on Social Enterprises regulates the organization, functioning, principles, manner of obtaining and forfeiting the status of a social enterprise, as well as determines the terms and conditions that an entity must meet in order to obtain the status of social enterprise. Any legal entity that meets the legal criteria, regardless of the way of establishment, including here CSOs, can obtain the status of social enterprise. Furthermore, this Law determines that Category A social enterprises shall mainly conduct activities in the fields related to social and family services<sup>12</sup>.

Regarding the issue of funding and providing funds for the function of social enterprises, this law defined the possibility of funding/subsidizing social enterprises as well as the possibility of contracting of services provided by them through public procurement procedures. Specifically, this law foresees allocation of funds for the development and promotion of social enterprises from various sources, where the Ministry and municipalities can plan financial means to support certain measures, including the employment of vulnerable groups. Additionally, this law foresees the possibility of public institutions, in the capacity of contracting authority, to conclude contracts with social enterprises, through procurement procedures, respecting the general principles of transparency, competition and control based on the legislation in force<sup>13</sup>.

## **2.5. Law on Public Procurement**

The criteria and procedures for spending public money through procurement procedures are regulated with the provisions of the Law on Public Procurement. In the amendments made in 2016 in this law, the legal framework for the contracting of services with CSOs was

<sup>8</sup> Article 3, par. 1.19 of the Law on Health

<sup>9</sup> <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=9926>.

<sup>10</sup> Article 4, par. 2 of the Administrative Instruction (MH) No. 04/2014 for Health Care Services in Humanitarian Health Institutions and other Forms of Civil Society Organization in the Health Sector. <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=9926>

<sup>11</sup> *Ibidem*, Article 5, par. 3

<sup>12</sup> Article 5, par. 2 of the Law on Social Enterprises.

<sup>13</sup> Article 24, 25 and 26 of the Law on Social Enterprises.

created, specifically, CSOs were enabled to participate in procurement procedures. These changes were initially considering CSOs as an economic operator<sup>14</sup> and later on the legal basis for the further regulation of the contracting of services by CSOs has been created, as the following: “The Government of the Republic of Kosovo with a by-law determines rules, standards and procedures of contracting public services for civil society organizations”<sup>15</sup>. These provisions, create a clear legal basis that enables a different treatment of contracting public services with Civil Society Organizations in procurement procedures, against the standard procurement procedures in which any legal entity can be contracted.

## **2.6. Law on Public Financial Management**

The Law on Public Financial Management is the basic legislation in the area of public financial management in the Republic of Kosovo, and consequently almost every public institution in the Republic of Kosovo is obliged to rely on its provisions when spending public money. Regarding spending of public money in the form of subsidies, which relates to the public funding of CSOs, Article 53 of this Law provides that the respective Minister of Finance is explicitly authorized to issue rules that must be adhered by budgetary organizations or public authorities when selecting the recipient or recipients and also determining the amount or amounts to be provided as a grant, donation or subsidy. These rules must ensure that the process is aimed at achieving the goals of the Assembly (Parliament) when itself has authorized the grant, donation or subsidy in the relevant Law on budget allocations.<sup>16</sup> These legal provisions establish legal basis for regulating the criteria and procedures for spending public money from the “Subsidies and Transfers” category. However, even though these provisions are broad, they create a clear basis for providing subsidies, grants and donations without exclusion of NGOs, businesses and individuals, when such funding is planned in the annual budget allocations.

In the context of these provisions, in 2017 Ministry of Finance, Labour and Transfers issued Regulation MF-No. 04/2017, which uniquely regulates public funding of NGOs for all budgetary organizations. This Regulation defines the basic criteria, standards and procedures for public funding of NGOs, with purpose of establishing a transparent and accountable system for funding the programs and projects of NGOs with public funds that are of public interest in the Republic of Kosovo. On the other hand, the Ministry of Finance, Labour and Transfers has not yet issued any by-laws similar to Regulation 04/2017, to regulate the funding of other entities by NGOs (individuals, business organizations or other bodies), which would also have the same legal basis as Article 53 of the Law on Public Financial Management, which could further regulate this process.

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14 Article 4 (1.19) Law on Public Procurement, <https://gzk.rks-gov.net/ActDetail.aspx?ActID=11332>

15 Article 132A of the Law on Public Procurement, <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2772>

16 Article 53, Par. 3, Law No. 03/L-048 on Public Financial Management and Accountability. Electronic version available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2524>

### **3. ANALYSES OF THE LEGAL PROVISIONS RELATED TO CONTRACTING SERVICES WITH CSOs IN THE REPUBLIC OF KOSOVO**

The legal provisions presented in the second part of this policy document testify to the existence of a solid legal basis for the contracting of services with CSOs, but also of the criteria and procedures for concluding contracting agreements.

Assessing by the right of CSOs to contract services with public institutions, it is clear that the primary legal infrastructure is almost complete:

- Initially, through the Law on Freedom of Association, the right of CSOs to exercise economic activities for non-profit purposes and the right to manage property and assets was regulated, based on the same purpose. Based on these provisions, all CSOs can exercise economic activity after meeting legal conditions to exercise this economic activity, unless explicitly a type of economic activity is prohibited to be exercised by this category;
- Subsequently, through the Law on Social and Family Services and the Law on Health, the right of CSOs to provide social and family services and health services was regulated. The provisions of the Law on Social and Family Services are among the most favorable and clear provisions regarding the contracting of social and family services with CSOs, in which occasion these provisions create a legal basis for contracting these services in cases where the state bodies that are responsible for providing such services, do not provide such services. Similarly to this, the provisions of the Law on Health are very favorable for the provision of health services, where this form presents supplementary possibility, alongside other forms of provision of health services. Moreover, the provision of these free health services is incentivized by exemption from payment of administrative tax for the licensing of humanitarian institutions. It is worth highlighting that the provision of social and family services, and health services is conditional to registration and licensing of CSOs by the line Ministries. However, public institutions have not developed normative acts or similar acts that define the procedures for contracting of these services by CSOs;
- On the other hand, the Law on Social Enterprises stipulates that any entity that acquires the status of a social enterprise has the right to receive grants for the promotion of social enterprises and be contracted for provision of services. NGOs with social enterprise status could also benefit from tax legislation. This law has determined that this contracting of services shall be done through procurement procedures, whereas the benefit from these grants is supposed to be done according to the criteria and procedures defined by Regulation No. 04/2017, under the assumption that the social enterprise is registered as an NGO.

Assessed by the discretion of public institutions to contract services from CSOs, it is observed that there is a proper legal basis, but noticeably there is a lack of legal procedures that must be adhered:

- The Law on Social and Family Services and the Law on Health, although they have standardized and advanced the contracting of services by CSOs, they have not specified the procedures and criteria for the contracting of these services. The

Law on Social and Family Services as a form provides “**commissioning and contracting procedures**”, whereas Administrative Instruction (MH) No. 04/2014 for Health Care Services in Humanitarian Health Institutions and other Forms of Civil Society Organization in the Health Sector as a form provides “**cooperation agreements**”. However, the above legal provisions do not define the procedures for contracting social and family services, they only create the basis for allowing such contracting. Exceptionally, the Law on Social Entrepreneurs stipulates public procurement procedures for the contracting of services by CSOs;

- The Law on Public Procurement provides the status of economic operator to CSOs and has created the legal basis for the drafting of a by-law of procedures and criteria for contracting of services by CSOs. Even though this provision leaves a lot of room for regulation of procurement procedures for CSOs dealing with the contracting of services, so far, such a provision has not been used to issue the by-law to regulate specific procedures only for the contracting of services for CSOs. Consequently, this makes it impossible to contract services by CSOs.
- The Law on Public Finance Management gives authorization to relevant Minister to determine the criteria and procedures for issuing grants. However, the legal basis in this case refers to the spending of public money (grants) from the economic category “Subsidies and Transfers”, which is very different from the contracting of services. Based on this provision, it was issued Regulation No. 04/2017. From the point of view of the legislation for the management of public finances, even though the provision of services/contracting of services is not expressly mentioned, a significant number of projects that are financed based on this regulation are aimed at providing social or health services for certain categories of society, for which there are obligations on the part of government institutions. Consequently, the aforementioned Regulation serves indirectly even in the case of outsourcing of services by NGOs. A clear distinction must be made here between the services that are provided for public good, for which institutions have duties and responsibilities, and of purchase of services by institutions to meet their needs. However, the regulation has not specified and regulated the situations of outsourcing of services, which could be fully regulated by its amendment (change).

Therefore, it can be concluded that the legal basis for realization of the right of CSOs to contract services is complete, but for the needs of public institutions, a normative act that defines the criteria and procedures for contracting services is missing. Therefore, the current situation makes public institutions to proceed according to Regulation No. 04/2017, according to similar procedures issued by the authorities themselves or even through direct contracting.

In order to design the solution and in order to clarify whether the regulation of the criteria and procedures for contracting services with CSOs should be regulated by a by-law deriving from the Law on Public Procurement or another modality should be chosen, the concept of contracting services as well as the economic category from which the contracting is funded.

The budgeting process in the Republic of Kosovo is carried out in five economic categories of expenses, including the “Goods and Services” category and the “Subsidies and Transfers” category. The most detailed specification of these economic categories of expenses is made by “Financial Rule 01/2013/MF – Public Funds Expenditure”. According to this Rule, spending public money from the “Subsidies and Transfers” category does not

require implementation of public procurement procedure<sup>17</sup>. Likewise, the payments made by this category are unilateral and non-refundable payments, in accordance with a clear legal basis (law, regulation or decision), which enables the organization to make such a payment by this category. Non-refundable payments, according to this Rule, are of such a nature and are unilateral, since in this case there are no goods or services that derive as compensation for the payment. On the other hand, for the expenditure category "Goods and Services" in general, this Rule does not provide for the exception of public procurement rules, except in some cases.

Therefore, based on these provisions, it can be concluded that the public fund expenditure from the category of "Subsidies and Transfers" should be done for the purpose of subsidizing CSO projects/programs (since in this case there is no purchase of goods or services), while public fund expenditure from the "Goods and Services" from economic expenditure category must be done for the purpose of contracting services from CSOs (since in this case we have the purchase of services). Thus, the basis for dividing or separately regulating the funding of CSO programs and projects from the contracting of services with CSOs, from the perspective of budget organizations is the economic category where the funds are budgeted in the budget allocations.

On the other hand, the concept of contracting services is closely related to the responsibilities of public institutions. The various practices coming from other countries prove that the contracting of those services is done that the public institutions legally (by constitution, law or by-law) must provide directly, and in cases contracting of which is not prohibited by the legislation in force<sup>18</sup>, such as the example of providing free education up to a certain age. This obligation for many states originates from international instruments and constitutional provisions, and represents a legal obligation for public authorities to provide directly. If that is not possible, these services should be contracted by public authorities. Regarding this matter, the legal regulation is also similar in the Republic of Kosovo, where the Constitution guarantees the provision of free basic education. On the other hand, among the main reasons for contracting these services are limited capacity of public institutions, need for their work to focus on the field of policy drafting in other fundamental areas, it's easier to achieve institution's objective, added value from implementing partners and better accountability in spending public money.<sup>19</sup>

Consequently, the contracting of services by state institutions should be conducted for the services that the institution has a legal obligation to provide, for which it may have human and financial resources, but for different reasons (saving on expenses, ensuring the best service, avoiding conflict of interest, efficiency of services and similar reasons) decides to outsource services. This contracting is conducted with the sources of the public institution which are budgeted in the category of economic expenses as "Goods and Services". On the other hand, public financing of CSOs is done to reach program objective/activity (not a legal obligation) and for which activity the public institution does not have and is not supposed to have administrative staff. This funding is conducted with the sources of the public institution which are budgeted in the category of economic expenses as "Subsidies and Transfers".

Regarding this conclusion, we can take the following examples:

- The Law on Social and Family Services provides a concrete example of contracting of services. Under this Law, in circumstances when there is no support from family or

<sup>17</sup> Article 21, *Financial Rule NO. 01/2013/MF – public fund expenditure*.

<sup>18</sup> See *Inclusion of Civil Society Organizations in Contracting of Government Tasks*, pages 2 - 4

<sup>19</sup> See *A Handbook on Non-State Social Service Delivery Models*, pages 23-26

when it is not sufficient to ensure welfare of an individual, state is obliged to provide social and family services for the people who differently would not be supported in the manner which would respect their dignity as human beings and their fundamental rights based on Kosovo legislation and in international conventions on human rights. Unless there are extraordinary circumstances of need or of protection, these services will be provided to persons in need and families within a community setting and not in residential homes<sup>20</sup>. Therefore, these provisions determine the obligation of the state institutions, namely the Ministry for Social Welfare and the Municipalities of the Republic of Kosovo, to provide the individual with social and family services, to ensure his dignity. In such cases, public institutions are obliged to initially try to find a solution through outsourcing of services (within community setting), through their settlement, through other families. In exceptional cases, these institutions will have the discretion to decide whether to provide these services with internal resources (if they manage residential institutions) or to outsource these services through non-public residential institutions.

- We have a similar example also with the work of the Custodian Body, whose function is regulated by Law No. 2004/32 on Family and by the Law on Social and Family Services. According to the Family Law, this body has the responsibility to ensure that all the rights and interests of the person under custody are guaranteed according to the provisions of this Law, as well as other forms of protection provided by Law to help minors and adults. Additionally, this body applies educational measures and other measures defined by the court, as well as conducts and supervises all activities under its power.<sup>21</sup> In this case, we also deal with a legal responsibility of public institutions, which can be provided through internal resources (if there are sufficient and if it is evaluated as a proper method) or through the contracting of services.
- On the other hand, we have an example of financing projects and programs, and that is in an announcement made by the Ministry of Culture, Youth and Sports. This Ministry announces that “in the field of art and cultural heritage for the year 2022, among the program priorities is strengthening of the role of the independent cultural scenes in development and implementation of public policies, the increase in the quality of artistic creativity, the identification and support of new talents, the activation of young people in decision-making and activities in the field of art and cultural heritage, networking and promotion of the local cultural product as a competitive product in the international market of the creative industry”<sup>22</sup> Therefore, in order to realize these priorities, the Ministry of Culture, Youth and Sports has announced a public announcement according to the criteria and procedures of Regulation MF -No. 04/2017 for funding NGOs in these fields. Specifically, the activity of increasing quality of artistic creativity cannot be achieved through the Ministry’s staff, and furthermore, in this call, the Ministry has also listed the objectives of the call (Promoting art and cultural heritage through enrichment, diversification and increasing the quality of cultural life, encouraging volunteering and active participation of young people in cultural life inside and outside the Republic of Kosovo, with an emphasis on children and persons with disabilities, empowering coordination and partnership between culture and cultural heritage institutions and civil society through strengthening of the independent cultural scenes and the promotion of new actors operating in the

<sup>20</sup> Article 1.2. of the Law No. 02/L-17 on Social and Family Services, which was supplemented and amended by Law No. 04/L-081

<sup>21</sup> Article 234 , Law No. 2004/32 on Family

<sup>22</sup> See [Thirrja\\_publike\\_Kulture\\_dhe\\_Trashegimi.pdf\(mkrs-ks.org\)](http://Thirrja_publike_Kulture_dhe_Trashegimi.pdf(mkrs-ks.org)),

field of culture and similar).

Another issue that should find an epilogue is the legal basis and the scope of the regulatory act that would regulate the field of contracting services with CSOs. Based on the analysis of the legislation related to the contracting of services with CSOs, there are two options for by-laws: As the first option, the by-law deriving from the Law on Public Procurement, which defines the principles and procedures of contracting services for economic operators, including CSOs; and the by-law deriving from the Public Financial Management Law, where the principles and procedures of contracting services from CSOs will also be defined, as a second option. Other countries also have such a practice, where in many countries the main legislation that regulates the contracting of services by CSOs is that of public procurement. Exceptionally, other procedures may also be recognized in different countries.<sup>23</sup>

Since there is already a legal basis in the Public Procurement Law (as a result of the Government Strategy for Cooperation with Civil Society 2013 - 2017) and it is easier for implementation, the first option is presented as a recommended option. Additionally, it is considered to be in accordance with the legislation in force for the management of public finances, since the public funds expenditure is made from the category of economic expenses "Goods and Services". Moreover, this is also in line with the international obligation of the Republic of Kosovo to align its legislation with *Acquis*, it might be that at the level of EU legislation, this field is regulated by the relevant public procurement Directives.

The second option would require creating a proper legal basis in the new Law on Public Financial Management (since this Law is in the process of being amended), and then the drafting of a by-law for the contracting of services by CSOs.

This policy document recommends adoption of the first option, respectively drafting of the by-law based on the Public Procurement Law, for the contracting of services with CSOs.

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23 See *Inclusion of Civil Society Organizations in Contracting of Government Tasks*, page 20

## 4. RECOMMENDATION FOR LEGAL ACTIONS TO REGULATE CONTRACTING OF SERVICES WITH CSOs

Aiming at proper regulation of legal infrastructure for contracting of services by CSOs, it requires inter-institutional coordination and various legal actions, as below:

- **The new Public Procurement Law must sustain the treatment of CSOs** - Since the Ministry of Finance, Labor and Transfers is preparing the Draft Law on Public Procurement, it must be ensured that the guaranteed treatment for CSOs according to the current Law shall also be reflected in the new Draft Law. This can be argued very easily since the EU legislation has a similar regulation and the Government of the Republic of Kosovo, according to the provisions of the SAA, is obliged to transpose this legislation. This provision should create legal basis for a by-law to avoid certain procedures and terms (deadlines) that may be unreasonable for this type of contracting;
- **The new Regulation on Public Financing of NGOs should limit its scope only to funding projects/programs, and shall not be applied to the contracting of services** - Since this by-law is also in the process of being supplemented and amended by the Ministry of Finance, Labor and Transfers, it must be ensured that this by-law applies only to the funding of CSOs from the "Subsidies and Transfers" category; and
- **The by-law for the contracting of services should be drafted to include also services from CSOs** – Based on the new Law on Public Procurement and taking into consideration the criteria of the EU legislation and the best practices, under the sponsorship of MFLT and PPRC, the by-law for the contracting of services with CSOs should be drafted and adopted by the Government of the Republic of Kosovo.

## **ANNEX 1: THE FRAMEWORK OF BY-LAW FOR THE CONTRACTING OF SERVICES WITH CSOs**

Based on a preliminary analysis, the by-law for contracting services with CSOs may have 5 chapters. The content of the chapters will depend on what regulation the new Public Procurement Law will have. Under the assumption that the regulation will be basic, these chapters should cover the following matters:

### **CHAPTER I – GENERAL PROVISIONS**

This chapter should clearly define the purpose of the act (contracting of services by economic operators, including CSOs), its scope, the EU legislation it transposes (Directive No. 24/2014 and 25/2014), definitions and general principles.

The scope of this by-law should outline that there is no scope limited only to the contracting of services by CSOs, but its scope is the contracting of certain social services by all economic operators, including CSOs, as well as restrictions that certain services can only be contracted by CSOs.

Furthermore, the scope must define exactly which types of services are allowed according to this procedure and which types of services cannot be contracted under this by-law. According to EU legislation, the services that can be contracted are defined in Annex XVI of Directive 24/2014, that is as follows:

1. Health, social and related services;
2. Administrative, social, educational, health and cultural services;
3. Compulsory social insurance services;
4. Beneficiary services;
5. Other community, social and personal services, including services provided by trade unions, political organizations, youth associations and other services to members of organizations;
6. Religious services;
7. Hotel and restaurant services;
8. Certain legal services;
9. Other administrative and state services;
10. Provision of services for community;
11. Services related to prison, public safety and certain rescue services,
12. Investigative and security services,
13. International services; and
14. Postal services and other various services.

Regarding the general principles, this part should reflect the general principles of spending

public money, on the one hand, and contracting services, on the other. As two main principles related to the contracting of services, it appears the principle of transparency and the equal treatment of all economic operators<sup>24</sup>, but also principles such as competitiveness, effectiveness and efficiency of spending public money, pre-defined criteria, two instances and preserving the independence of the beneficiaries should be regulated for this by-law.

In this section it is recommended to keep a broader definition for CSOs (a definition beyond non-governmental organization), including here separate entities, religious communities and similar organizations. All this with aim to create the legal basis for contracting services by these entities.

Moreover, within the framework of the transposition of the EU Directives, there should be a transitional period regarding the minimum amounts to be procured, since the EU legislation has defined that these criteria and procedures are valid for amounts equal to or higher than €750,000, respectively €1,000,000, these amounts which might be high for the Republic of Kosovo.

## **CHAPTER II - CONCLUSION OF CONTRACTS FOR CONTRACTING SERVICES WITH CSOs**

This chapter should regulate all actions, from the planning and announcement of the tender to the conclusion of contracts.

This chapter should initially regulate the tender announcement process. The announcement of the tender can be made between contract notification and through indicative notice of information.

The contract notice must contain the following elements:

1. Name, identification number (when provided for in domestic legislation), address, including NUTS code, email and web address of the contracting authority;
2. The NUTS code for the main location of the works, in the case of works, or the NUTS code for the main place of development or implementation, in the case of supplies and services;
3. Brief description of the respective contract, including CPV codes;
4. Conditions for participation, including:
  - 4.1. according to the case, indicate whether the contract is limited to organizations employing persons with disabilities or whether its implementation is limited to the framework of occupational safety programs;
  - 4.2. according to the case, indicate whether the performance of services is a right reversed by law, regulation or administrative provision for a particular profession;
5. Deadlines for contracting the contracting authority in relation to participation; and
6. Brief description of the main features of the procurement procedure to be implemented<sup>25</sup>.

As an alternative, the announcement can also be made through the indicative notice of

<sup>24</sup> Article 76. Paragraph 1 of Directive 24/2014

<sup>25</sup> Directive 24/2014, Annex V, Part H

information. The indicative notice of information must refer specifically to the types of services that will be the subject of the contracts to be awarded and it must be stated that the contracts will be awarded without further announcement and interested economic operators are invited to express their interest in writing. The indicative notice of information must contain the following information:

1. Name, identification number (when provided for in legislation in force), address, including NUTS code, email and web address of the contracting authority; and
2. Brief description of the respective contract, including predicted total value of the contract and CPV codes<sup>26</sup>

Other elements can be added to the announcement, such as the application conditions and requirements from the applicants, specific characteristics of the contracted service, budget, relevant documentation necessary for application, method of application and closing date, evaluation methodology and other required specifics.

Additionally, this chapter should define that the contracting of these services can also be done through direct negotiation (without a competitive procedure) in accordance with the criteria stipulated in the Law on Public Procurement, or even by identifying very specific circumstances (in case of natural disasters, in case of technological collapse, in cases where it is necessary to protect human life and health, in cases where it is clearly visible that there is no competition in the field of service that are planned to be contracted, in case the purpose of the service that is planned to be contracted is complicated and no public authority can provide this service).

Regarding the tender evaluation procedures, apart from the general provisions of the Public Procurement Law, additional specifications can be made here in some areas such as the defining that dominant criteria is prior experience - general and specific, administrative capacities and staff qualification, financial stability have obvious advantages compared to the price of the offer; as for composition of the evaluation commissions, there should be the possibility of participation (as a member or observer) of an external expert, special provisions so that there are no delays in contracting and similar criteria.

Furthermore, in this chapter it should be specified that a special e-procurement module should be developed, to enable the implementation of this by-law with the relevant specifications.

### **CHAPTER III - RESERVATION OF SPECIFIC CONTRACTS FOR CONTRACTING SERVICES WITH CSOs**

The by-law must authorize the Government of the Republic of Kosovo for the possibility of reserving the rights to participate in the procedures for awarding public contracts exclusively for health, social and cultural services to the organizations that provide these services. These contracts can be concluded for a period of up to 3 years. The complete list of these services according to Directive No. 24/2014, together with the CPV codes includes:

1. Educational administrative services (with code 75121000-0);
2. Health Care administrative services (with code 75122000-7);
3. Housing administrative services (with code 75123000-4);

4. Supply services for internal support staff (with code 79622000-0);
5. Supply services for nursing staff (with code 79624000-4);
6. Supply services for medical staff (with code 79625000-1);
7. Preschool education services (with code 80110000-8);
8. Higher education services (with code 80300000-7);
9. E-learning services (with code 80420000-4);
10. University services for adults (with code 80430000-7);
11. Staff training services (with code 80511000-9);
12. Training equipment (with code 80520000-5);
13. Tutorial services (with code 80590000-6);
14. All health and social work services (from code 85000000-9 to code 85323000-9);
15. Library, archive, museum and other cultural services (with code 92500000-6);
16. Sport services (with code 92600000-7);
17. Services provided by organizations with a social character (with code 98133000-4); and
18. Support services provided by youth associations (with code 98133110-8);

An organization in order to be eligible to apply for these reserved services must meet all the following conditions:

1. its purpose must be implementation of public service objectives related to the provision of reserved services;
2. profits must be re-invested with the aim of achieving the organization's objective. When profits are distributed or redistributed, this should be based on the respective contributions;
3. the management or ownership structures of the organization that complete the contract are based on the principles of employee ownership or similar principles of participation, or require the active participation of employees, users or interested parties; and
4. the organization has not been awarded a contract for the services in question by the relevant contracting authority in accordance with these criteria within last three years<sup>27</sup>.

## **CHAPTER IV SUPERVISION OF CONTRACT IMPLEMENTATION**

This chapter should address supervision of the contract implementation. In addition to the standard procedures defined in the Law on Public Procurement, this part can provide for other supervision and monitoring mechanisms of an ex-post and ex-ante nature. Surveys with service recipients, external expert evaluations, additional payments based on good performance and inspections are methods for ensuring the implementation of contracts and increasing the quality-of-service delivery.

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<sup>27</sup> Article 77. Paragraph 2 of Directive 24/2014

## **CHAPTER V – GENERAL PROVISIONS**

This part defines the entry into force of the by-law.



